APPEAL NO. 92015

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 13, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. (hearing officer) determined that the employee, (employee), the appellant herein, failed to prove by a preponderance of the evidence that he sustained a compensable back injury in the course and scope of his employment as a worker in the housekeeping department of the (employer) (hereinafter called "Employer"). The appellant seeks review of the hearing officer's determination that an injury to the back did not occur within the course and scope of employment (which he contends was against the great weight and preponderance of the evidence) and asks that the opinion be reversed and rendered with a finding that appellant had good cause for failure to report the injury to the employer. Appellant asks that medical benefits be found to be due him for his back condition.

DECISION

We find that the evidence supports the findings and conclusions of the hearing officer and affirm his decision on the issue that was tendered to him for dispute.

At the beginning of the hearing, the following stipulations were entered into the record (although not expressly recited as stipulations in the hearing decision) and will be repeated here:

1. The claimant is (employee).

2. The Employer is (employer).

3. The carrier is (carrier) of Texas.

4. The claimant was employed by the employer on (date of injury).

5. The employer had workers' compensation insurance coverage written by the carrier, on (date of injury).

6. The claimant was covered by workers' compensation insurance on (date of injury).

7. On (date of injury), the claimant lived at (address) (city) County, Texas.

8. The carrier paid benefits to the claimant for his compensable injury.

The testimony and evidence developed by the parties brought forth the following facts. The appellant, who had worked as an accountant in (city), was employed to work in the housekeeping department of the employer on or about the first of December, 1990. On

(date of injury), the incident giving rise to two claims for compensation occurred. Appellant testified that at about eleven o'clock that morning, he was in the hotel's laundry room. He had removed wet sheets from the washer, loaded them onto a cart, and was pulling the cart, with one hand, in a rush to put the sheets in the dryer. He slipped on some water that leaked from one of the washers and fell backwards. A metal band going around the bottom of the cart, about five inches from the ground, hit his leg above the ankle. His testimony was not clear on whether he slipped before or after the metal bar hit his leg. He testified his leg went under the cart. He stated that he fell on his buttocks and back, onto the cement floor. There was considerable testimony and controversy about what happened to the cart. Appellant initially testified that the cart fell onto him but after extensive cross-examination, re-direct, and re-cross, it was established that the cart did not overturn or flip over, although the appellant continued to say that the cart "fell" on him. Appellant stated that he felt his knee "pop," and experienced pain going all the way up through his leg to his waist. No one witnessed the accident. He continued to work the rest of the day, but his foot was swollen the next day and he did not come to work. He stated that he telephoned his supervisor, ("Ms. M"), and told her that he hurt his foot. He agreed that the following description of the injury on the Employer's Report of Injury (TWCC-1) accurately reflected what he told Ms. M about how the accident occurred: "Hit his right foot with a laundry cart. His foot was swollen and he was unable to walk." Soon thereafter, he saw ("Dr. T."). Appellant stated he had X-rays taken of his foot; that Dr. T examined only his foot, and that although he had pain up to the waist, he did not mention this to Dr. T because, in his own mind, the pain resulted from his foot and leg. He could not recall whether he told Dr. T that he had fallen to the ground. After two or three weeks off work, he "had a necessity to work" because he needed money, and asked Dr. T to give him a release, which he said was required by Ms. M before he could return. He denied that he was recovered at this time. He said that he did not know at this time that the company was going to pay him, and the benefit check, a payment of $165.90 for TIBs from the period January 10 until January 21, 1991, arrived after he returned to work. He worked two months after he returned (on January 21, 1991) feeling constant pain during this time which he controlled with Tylenol. He stated that there were times when he wouldn't be able to walk by the afternoon. On his last day of work for the employer (March 21, 1991), he told Ms. M that he felt sick and would no longer be able to work. He worked through lunch and went home. Thereafter, he saw a doctor in (city), approximately three times. He stated he did not return to see Dr. T because he did not have the money, and Ms. M told him the company would not cover any more doctors, and the Mexican doctor only cost $2.00. The next doctor he consulted, on April 15, 1991, according to the initial medical report, was ("Dr. G"). Dr. G was recommended by his attorney. It was after Dr. G's examination that, for the first time, he realized that he had a problem with his lower back. When asked why he went to Dr. G instead of Dr. T, he stated that it did not occur to him to return to Dr. T. He stated that he had never had an accident nor any injury to his back before or since (date of injury).

In evidence were two claim forms submitted to the commission by appellant that were completed with the assistance of his attorney's office. The first form, dated April 9, states how the accident happened: "I slipped on water that was on the floor, causing the cart I was

pulling to fall on me." The parts of the body affected are described as "right leg, foot, and knee." The second form, also dated April 9, 1991, which was filed two weeks later, appears to be an identical copy of the first, except that the words "and back" are added to the description of affected body parts. Appellant does not read or write English. By way of explanation, appellant said that the first time the form was filled out, he did not know that his back was affected. He then went to Dr. G. When respondent's attorney asked appellant what Dr. G told him was wrong with him, appellant's answer was "He examined me and he told me that that was also related to my weight." (Appellant stated, earlier in his testimony, that he had gained "a little" weight since (date of injury). Thereafter, the claim form was amended to include the back, but appellant had no recollection as to who had filled out the form or amended it.

The medical documents in the record consist of a February 1, 1991 letter from Dr. T, an initial medical report from Dr. G, four "return to work" note forms from Dr. G, and an apparent order for radiological services on May 2, 1991, from Dr. G[1]. The letter from Dr. T indicates that appellant sustained a "contusion" to the middle and distal l/3 of his right leg, and he was treated symptomatically with "subsequent recovery." Dr. G's initial medical report reports a spasm in the paralumbar area, and a swollen right knee (the rest of the assessment is not clear because words appear to have been omitted or left out). The later notes signed by Dr. G indicate a herniated disc and strained knee.

Ms. M, employer's executive housekeeper and supervisor, stated that she periodically told her employees at staff meetings of the importance of safety and of reporting injuries. She stated that appellant called her at home the night of (date of injury), and reported that he had hurt his foot on the laundry cart on his way to get dirty linens from the laundry chute. She stated that he did not say that he fell, or that he had slipped on water. She said he reported that he caught his foot on the cart. He did not complain of pain to any other part of his body. She told him he could see the doctor of his choice. She made an incident report next day based upon what he told her. The report states that appellant called her (date of injury) at home, that appellant hurt his foot in the laundry room and was swollen, and he could not work January 4th. She took him back to work based upon his release from the doctor. She states that he worked for two months, never complained of further pain, and was, to her knowledge, able to do his job. Ms. M stated that the laundry carts were solid and heavy and she had never seen a full one turn over. She stated that on appellant's last day of work in March, he came to her and said he was feeling sick, and asked if he could go home. She told him that he could, and his wife picked him up. After

[1]At the end of the hearing, the hearing officer specifically requested the parties to supply a radiological report on the x-rays ordered by Dr. G as well as office notes of Dr. G relating to examination of appellant. The carrier agreed to "fax" a release to appellant's attorney in order to get these records. On December 17, the adjuster for respondent wrote that the release had been faxed, but not returned signed to them, and he essentially put the "ball" in appellant's court to obtain the records. However it occurred, records specifically requested by the hearing officer as relevant to his determination were never tendered.

he was gone for a couple of days without calling in, Ms. M called appellant at home. He said he had not seen a doctor because he did not have money. She said he would need a doctor's excuse for absence. He indicated that he wanted to go to (city) to see a doctor but didn't want to fight the traffic, and then asked her if she could put this new pain into a workers' compensation "thing" so he could see an American doctor. She replied that she couldn't do this because it wasn't related to an injury. She says she reminded him that a few days earlier he had told her he was sick, not injured. She testified that he did not say at this time that his back hurt. The first time she was aware that appellant contended that his injuries extended beyond the foot was at the benefit review conference.

Appellant testified, and respondent's attorney agreed, that respondent had resumed temporary income benefits and was still paying them, at a rate applicable to persons earning less that $8.50 per hour. Neither the date nor reason for resuming TIBs was stated in the record.

At the outset, the issues must be clarified. First, the 1989 Act, Article 8308-5.01 (a), requires an employee to notify an employer of an injury within thirty days after it occurs. The effect of a failure to so notify the employer will, as a general rule, relieve the carrier of liability. Art. 8308-5.02. A commission determination that there was good cause for failure to notify the employer is an exception to this general rule. *See* Art. 8308-5.02(2). However, this "notice" issue was not raised as a defense to compensability by the carrier and was not before the hearing officer, nor did the parties agree to include it as an issue, so it has been waived as a defense. *See* Art. 8308-5.21(a). The reason that evidence was introduced by the carrier of the employer's lack of knowledge about the back injury goes to the issue of whether the back was injured in the course and scope of employment on (date of injury), along with the foot and lower leg for which compensability is conceded.

Second, the "course and scope" issue before the hearing officer, and his ruling, concern the purported back injury only. At the beginning of the hearing, the hearing officer asked for agreement from the parties as to the issue. The counsel were not identified on tape as they replied. One attorney agreed that the dispute was the one listed in the benefit review conference report: "carrier is denying medical treatment and any indemnity (temporary income benefits) relating to the alleged back injury." The other attorney indicated that only the foot was "undisputed." An injury to the knee was diagnosed at the same time as the back condition. However, the hearing officer never compelled a verbal agreement by the parties on the unresolved issue. He subsequently introduced the benefit review conference report into evidence as Hearing Officer Exhibit #1. The carrier's position, set forth in that report, is that only the right foot and lower leg were injured on (date of injury), but the back was not related. The knee is not put in issue by the report, and is only briefly mentioned in the claimant's position as an additional condition diagnosed by his doctor. The only objection to this exhibit was made by appellant's attorney who objected to the findings of the benefit review officer, but no objection was otherwise lodged by either party, and the document was admitted into the record. Testimony presented by the parties dealt almost exclusively with the back injury. The hearings decision ruled only on the disputed

back injury, and, while medical treatment for the back condition was denied, the hearing officer ordered continued payment of temporary income benefits ("TIBs") "until maximum medical improvement or otherwise authorized by law." Of course, if the officer had concluded that the disability of the appellant stemmed from the back injury (found not within the course and scope of employment), then ordering continued payment of TIBs would have been error. It is therefore implied, if nowhere expressly stated, that TIBs are being paid for disability relating to either the knee or the leg and foot injury the carrier has agreed was compensable. This is further supported by Stipulation 8 recited above. We would note that "recovery" does not preclude disability, or equate, necessarily to MMI. See Appeals Decision No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991. The respondent has asked that this decision be upheld in its entirety and has not cross-appealed the order to continue TIBs.

The hearing officer is the sole judge of the weight, materiality, relevance, and credibility of the evidence. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W. 2d 701 (Tex. Civ. App.- Amarillo 1974, no writ). The claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W. 2d 377 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). The finder of fact has the right to judge the credibility of the claimant and weight to be given to his testimony, in light of other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W. 2d 695 (Tex. Civ. App.- Amarillo 1978, no writ).

Although appellant's brief correctly notes that an accident need not be witnessed to establish compensability, a claimant is an interested witness and the trier of fact is not required to accept his testimony. Presley v. Royal Indemnity Ins. Co. , 557 S.W. 2d 611 (Tex. Civ. App.- Texarkana 1977, no writ). Only if the evidence supporting the hearing officer's determination is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, is it appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W. 2d 175 (Tex. 1986); Presley, *supra*.

There is probative evidence to support the hearing officer's decision that appellant failed to prove that a back injury occurred in the course and scope of his employment, and, on the points appealed to the appeals panel, the decision is affirmed.

_____

Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge